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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/823,113

04/13/2004

Bruce K. Zeller

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06/16/2006

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EXAMINER

RODRIGUEZ, JOSEPH C

ART UNIT

PAPER NUMBER

3653

DATE MAILED: 06/16/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/823,113	ZELLER, BRUCE K.	
	Examiner	Art Unit	
	Joseph C. Rodriguez	3653	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 9-27 is/are pending in the application.
- 4a) Of the above claim(s) 9-21 is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 22-27 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 13 April 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. ____. |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date ____. | 6) <input type="checkbox"/> Other: ____. |

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Final Rejection

Applicant's arguments filed 3/27/2006 have been fully considered but they are not persuasive for reasons detailed below.

The prior art rejections are maintained or modified as follows:

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 25-27 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-3 of U.S. Patent No. 6,863,182. Although the conflicting claims are not identical, they are not patentably distinct from each other because the instant claims are merely a broader version of the patented claims. Further, Applicant has ample motivation to seek broader claims, thus it would be obvious to modify the claims in such a manner.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 22, 24-25 and 27 are rejected under 35 U.S.C. 102(e) as being anticipated by Nierop (US 2004/0020830).

Regarding claims 22 and 25, Nierop (Fig. 1-4) teaches

a frame for separating excavated material comprising a base having a front wall (34), two side walls (fig. 2, sides perpendicular to front wall) and two horizontal side bars (beneath side walls) extending backward from opposite sides of a bottom of said front wall;

at least one vertical bar member (20b) extending vertically upward from a top of each of said horizontal side bars at an end of said horizontal side bars opposite said front wall (Fig. 1, 2);

and a grate (14) rigidly secured to and extending from a top of said vertical bar members to a top of said front wall such that said grate forms less than a ninety degree angle relative to a ground surface (Fig. 1, 2).

Regarding claims 24, 27, at least one flange (Fig. 3, 3a, near 40) extending downward from a bottom of said grate. Further, Applicant is respectfully reminded that claim language consisting of functional language and/or intended use phrasing is given little, if any, patentable weight as the apparatus must merely be capable of functioning, or being used, as claimed. See MPEP 2112.02, 2114. Here, the structures cited above are certainly capable of facilitating engagement with a bucket of a loader/backhoe. Further, it is noted that the claim language "from a top" is interpreted as extending from an area near the top, thus a bar extending "from a top" is not regarded as required to be directly physically connected to the "top".

Claims 22 and 25 are rejected under 35 U.S.C. 102(b) as being anticipated by Bane (US 359,659).

Bane (Fig. 1) teaches

a frame for separating excavated material comprising a base having a front wall (wall near right of page), two side walls (walls above B) and two horizontal side bars (B) extending backward from opposite sides of a bottom of said front wall;

at least one vertical bar member (A) extending vertically upward from a top of each of said horizontal side bars at an end of said horizontal side bars opposite said front wall (Fig. 1);

and a grate (O) rigidly secured to and extending from a top of said vertical bar members to a top of said front wall such that said grate forms less than a ninety degree angle relative to a ground surface (see clamps P).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 23 and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Nierop in view of Wall (US 1,005,907).

Nierop as set forth above teaches all that is claimed except for expressly teaching at least one support bar extending from a top of each of said horizontal side walls to a mid-length of said grate on opposite sides of said grate. This feature, however, is well-known in the support arts. For instance, Wall teaches a support structure for a screen that uses this type of support (Fig. 1, 2 support b4). Moreover, this additional bracing serves the common-sense purpose of providing additional support for the screen structure. Therefore, it would have been obvious at the time the invention was made to a person having ordinary skill in the art to modify the invention Nierop as taught above to achieve additional support for said grate.

Response to Arguments

Applicant's arguments that the prior art fails to teach the claimed features are unpersuasive especially in view of the newly formulated prior art rejections cited above. Here, it is further noted that the priority of the instant application only extends to August 26, 2002 as Applicant has not properly stated the relationship between applications 10/227,993 and 09/503,823. See MPEP 201.11(C). Consequently, as the prior art anticipates Applicant's claimed invention, the claims stand rejected.

Election/Restrictions

This application contains claims 9-21 drawn to an invention nonelected without traverse in the paper dated 9/26/05. A complete reply to the final rejection must include cancellation of nonelected claims or other appropriate action (37 CFR 1.144) See MPEP § 821.01.

Examiner has maintained the prior art rejections, statutory rejections and drawing objections as previously stated and as modified above. Applicant's amendment necessitated any new grounds of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL.** See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a). The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within

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TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Conclusion

Any references not explicitly discussed above but made of record are considered relevant to the prosecution of the instant application.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to **Joseph C Rodriguez** whose telephone number is **571-272-6942** (M-F, 9 am – 6 pm, EST).

The **Official** fax phone number for the organization where this application or proceeding is assigned is **571-273-8300**.

The examiner's **UNOFFICIAL Personal** fax number is **571-273-6942**.

Further, information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system.

Status information for published applications may be obtained from either Private PMR or Public PAIR. Status information for unpublished applications is available through Private PMR only.

For more information about the PAIR system, see

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<http://pair-direct.uspto.gov>

Should you have questions on access to the Private PMR system, contact the Electronic Business Center (EBC) at **866-217-9197** (Toll Free).

Alternatively, inquiries of a general nature or relating to the status of this application or proceeding can also be directed to the **Receptionist** whose telephone number is **571-272-6584** or to the Supervisory Examiner, Gene Crawford, **571-272-6911**.

Signed by Examiner Joseph Rodriguez

jcr

June 9, 2006

A handwritten signature in black ink, appearing to be 'JR' with a long, sweeping flourish extending from the bottom right.